No. 193.

Brief of Smith for C. C.

Filed Oct. 20, 1899.

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IN THE

Supreme Court of the United States.

October Term, 1899.

SETH CARTER, Plaintiff in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

No. 193.

Brief of Plaintiff in Error.

WILFORD H. SMITH,
E. M. HEWLETT,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

SETH CARTER, *Plaintiff in Error*,

vs.

THE STATE OF TEXAS, *Defendant in Error.*

No. 193.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error, a negro, was indicted at the November Term, 1897, and tried and convicted at the March Term, 1898, of the Criminal District Court of Galveston County, Texas, for the crime of murder, and the death penalty assessed against him. From the judgment of conviction, he appealed to the Court of Criminal Appeals of the State of Texas, which is the highest tribunal of the State of Texas in criminal matters, and the judgment of the lower court was there affirmed; and he now brings his case by writ of error to this court for final review.

The Federal question involved, relates to the matter of discrimination against negroes as jurors, because of

their race and color, in the Criminal District Court of Galveston County, Texas. The question was raised in said court, by the plaintiff in error, before plea was entered, filing a motion to quash the indictment, on the ground of such discrimination (see Record, p. 3), and also filing a motion to quash the panel of petit jurors on the same ground; and after presenting said motions, he asked leave to introduce evidence, and offered to introduce evidence to prove the fact of discrimination, as set out in his said motions, but the court refused to permit the introduction of any evidence on the point, and overruled said motions (see Record, p. 3), and the plaintiff in error reserved bills of exception to the court's ruling.

In the Court of Criminal Appeals, the exceptions to the ruling of the trial court on this Federal question were assigned as error. And after judgment in the Court of Criminal Appeals affirming the judgment of the trial court, the exceptions reserved to the rulings of the trial court on the matter of race discrimination were especially presented to the attention of the Court of Criminal Appeals, by the plaintiff in error, in his motion for rehearing. (See Record, pp. 37 and 38.)

Specification of Errors.

I.

The Court of Criminal Appeals should have reversed the case, because of the error in the trial court, in overruling the motion of the plaintiff in error to quash the indictment, and to quash the panel of petit jurors em-

paneled to try the cause; the said motions being made on the ground that the jury commissioners appointed to select the list of jurors from which the panel was drawn which tried the plaintiff in error, selected no persons of color or of African descent, known as negroes, to serve on said grand or petit jury, but on the contrary, did exclude therefrom all persons of color or of African descent, known as negroes, because of their race and color, and that the said grand and petit juries were composed exclusively of persons of the white race, while all persons of the colored race, or persons of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand and petit jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said Criminal District Court for a great number of years, which is a discrimination against the plaintiff in error, since he is a person of color and of African descent, known as a negro, and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the Constitution and laws of the United States; to which ruling of the court the plaintiff in error duly excepted, which exception appears of record in the case. (See Record, pages 22 and 23.)

II.

The Court of Criminal Appeals should have reversed

the decision because of the error in the trial court in refusing to permit the plaintiff in error to introduce evidence in support of, and to prove the allegations of his motions to quash the indictment, and to quash the panel of petit jurors empaneled to try said cause, and in overruling said motions without permitting an investigation of the matters of fact therein alleged; to which action of the court the plaintiff in error duly excepted, which exception appears of record in the case.

To better illustrate the errors of the trial court, upon which we rely for a reversal in this Court, we here insert Bills of Exceptions Nos. 1 and 2.

Bill of Exception No. 1.

STATE OF TEXAS *vs.* SETH CARTER. } No. 11876. In Crim. Dist. Ct. Gal. Co., Tex., M'ch Term, A. D. 1898.

Be it remembered that on the 17th day of March, 1898, the above-entitled and numbered cause was called for trial, and the defendant in open court, before he was arraigned, and before pleading to the indictment, presented and read to the court the following motion to quash the said indictment, to wit:

And now comes the said defendant, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners appointed to select the grand jury which found and presented said indictment selected no persons or person of color, or of African descent, known as negroes, to serve on said grand jury; but on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent,

known as negroes, because of their race and color, and that said grand jury were composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro; and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights guaranteed by the Constitution and laws of the United States; all of which the defendant is ready to verify.

SETH CARTER.

Sworn to and subscribed before me this 13th day of January, 1898.

[SEAL.] FLORENCE T. ATKINS,
Notary Public in and for Gal. Co., Tex.

After reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses to prove and sustain the allegations therein made, but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same without investigating into the truth or falsity of the allegations of said motion; to which action of the court the defendant then and there excepted, and tenders this his first bill of exceptions, and asks that the same be signed and filed as a part of the record in this case.

WILFORD H. SMITH,
Attorney for Seth Carter.

The foregoing bill of exceptions is approved, allowed, and ordered to be filed by the clerk as a part of the record in this case, this 30th day of March, 1898.

E. D. CAVIN,
Judge of the Criminal District Court,
Galveston County, Texas.

Bill of Exception No. 2.

THE STATE OF TEXAS *vs.* SETH CARTER. } No. 11876. In the Criminal Dist. Court, Galveston County, Tex. March Term, 1898.

Be it remembered that on the 17th day of March, 1898, at the trial of the above-entitled case, after the jury had been selected, duly accepted by both parties, empaneled, and sworn according to law to try said cause, but before the introduction of any evidence in the case, the defendant presented and read to the court the following motion to quash the panel of petit jurors selected to try said case, to wit:

And now comes the said defendant in his own proper person and moves the court to set aside and quash the panel of petit jurors selected and summoned to try him in the case herein, because the jury commissioners appointed to select the list of petit jurors, from which the present panel were drawn, selected no persons of color or African descent, known as negroes, so that they might be drawn on said panel, but that said jury commissioners excluded from the list of persons selected to serve as petit jurors for this term of this court all persons of color or of African descent, known as negroes, because of their race and color, and that said panel, as well as the list of jurors selected for the entire term of this court, is composed exclusively of persons of the white race, while all

persons of the colored race or persons of African descent, known as negroes, although constituting about one-fourth of the population and of the registered voters in the city and county of Galveston, and although otherwise qualified to serve as jurors, were excluded therefrom on the ground of their race and color, and that they have been so excluded from serving on any jury in this court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro, and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights, guaranteed by the Constitution and laws of the United States; all of which the defendant is ready to verify.

SETH CARTER.

Sworn to and subscribed before me this 13th day of January, 1898.

FLORENCE T. ATKINS,

[SEAL.] *Notary Public in and for Galveston Co., Tex.*

After reading the said motion the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses to prove and sustain the allegations therein made; but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same without investigating the truth or falsity of the allegations of the said motion; to which action of the court the defendant then and there excepted, and tenders this, his second bill of exceptions, and asks that the same be signed and filed as a part of the record in this case.

WILFORD H. SMITH,

Attorney for Seth Carter.

The foregoing bill of exceptions is approved, allowed, and ordered to be filed as a part of the record in this cause, this 30th day of March, 1898.

E. D. CAVIN,
Judge of Crim. Dist. Court of Gal. Co., Tex.

Argument.

The question of race discrimination against negroes in the courts of the States of the Union has been so recently and repeatedly before this court that it is hardly necessary to do more than state the case to obtain the proper application of the law.

The case at bar differs, however, from the recent cases of Gibson, Smith and Williams *against* the State of Mississippi (162 U. S. and 170 U. S.) in that the plaintiff in error here asked leave to introduce evidence, and offered to introduce evidence in support of his motions to quash the indictment, and the panel of petit jurors, and was denied this right by the court, who refused to hear any evidence upon the point. (See Exceptions 1 and 2, Record, pp. 22 and 23.)

This case hinges upon that one point. The question is whether or not the tender of proof (which the court refused to hear) by the plaintiff in error, in the trial court, of the allegations of race discrimination in the empanelment of the juries in that court, as set forth in his motions, was sufficient to obtain for him a reversal in this court?

The plaintiff in error advances the following propositions in support of his contention that the offer of proof

was sufficient, and the case should be sent back for a new trial:

First Proposition.

Asking leave to introduce witnesses and offering to introduce witnesses in a case then on trial, manifestly implies that the witnesses were present in court ready to come forward to testify, and it was not necessary that the names of the witnesses should have been inserted in the record, nor the testimony which they would have given.

Second Proposition.

But admitting, for the sake of argument, that the names of the witnesses should have been given, and the nature and character of the evidence sought to be introduced should have been set out in the bills of exception, yet when the presiding judge certifies that "he refused to hear any evidence," the necessity for further particularity in the nature of the proof offered ceases to be material.

Third Proposition.

Since the motions addressed to the trial court Federal questions, which were subject to ultimate determination in this Court, it was the bounden duty of that court, under the decisions of this Court, to permit the introduction of any evidence whatever, bearing upon the question, or tending to prove the issue, in order that this Court might be enabled to say whether or not the issue was established from the proof appearing in the record.

Gibson *v.* Miss., 162 U. S., 565.

Williams *v.* Miss., 170 U. S., 213.

Fourth Proposition.

By arbitrarily refusing to hear any evidence offered by the plaintiff in error in support of his motions charging the denial of sacred rights guaranteed by the Constitution of the United States, the trial court has placed the State of Texas, before this Court, in the position of a person who suppresses or destroys evidence which he ought to introduce, or to which the other party is entitled; and the rule *omnia præsumuniur contra spoiliatorem* ought to apply.

Fifth Proposition.

It will open wide the door to judicial oppression to permit the State courts in this way to nullify the amendments to the Constitution and overturn the decisions of this tribunal, upholding and giving expression to the rights of negroes to the equal protection of the laws, by arbitrarily refusing to allow the introduction of proof in support of motions, or other pleadings, calling the attention of this Court to injustices and wrongs upon their rights under the Federal Constitution, in the administration of State laws.

Neal *v.* Delaware, 103 U. S., 370.

Yick Wo *v.* Hopkins, 118 U. S., 356.

For these reasons, we respectfully ask that this judgment assessing the death penalty be reversed and a new trial granted.

WILFORD H. SMITH,
E. M. HEWLETT,
Attorneys for Plaintiff in Error.